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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 500.

JOHN S. KNOX, JR., AND ROBERT F. KNOX, LATE CO-PARTNERS AS KNOX & BROTHER, AND JOHN S. KNOX, PLAINTIFFS IN ERROR,

vs.

THE EXCHANGE BANK OF VIRGINIA, USE OF GEORGE W. CAMP, TRUSTEE.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED FEBRUARY 7, 1871.

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1 In the Supreme Court of the United States.

To the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States:

The petition of John S. Knox, jr., and Robert F. Knox, late co-partners, trading under the firm name of Knox & Brother, and John S. Knox, respectfully represents, that they are aggrieved by a final judgment of the supreme court of appeals of Virginia, (which said court is the highest court of law of said State in which the judgment could be had,) rendered in a certain action of debt instituted by the Exchange Bank of Virginia against your petitioners.

A transcript of the record of the judgment complained of is herewith presented.

The facts from the case agreed will appear to be as follows:

That the Exchange Bank of Virginia, on the twelfth day of July, 1866, made an assignment of all its assets to George W. Camp, trustee, for the benefit of the creditors of the bank, under and by virtue of an act of the legislature of Virginia, passed February 12th, 1866. (See session acts, 1865, '66, page 204.) That amongst the assets so assigned was the protested note in the declaration mentioned, and upon which the said action of debt was instituted. That after the institution of said suit, and after said deed had been recorded, the petitioners purchased the bills of said bank, which had been issued before the note was made upon which the said action was brought, and made a tender of said bills in payment of said note. That said bank was insolvent, and that the notes aforesaid were purchased at a depreciated value. That the
2 said bank bills filed with the pleas and brought into court and tendered in payment, were issued according to law, and are the genuine issues of said bank. The court is authorized to draw all such inferences from the facts agreed, as a jury might do if one were sworn. That said bills were issued in conformity with the 15 and 16 sections of chapter 58 of the code of Virginia, page 343.

Sec. 15. "All bills, notes, or other paper of a bank, signed by the president and countersigned by the cashier, promising or directing the payment of money, shall be obligatory on the bank; and the same shall be transferable and negotiable, if payable to order, by endorsement, and if payable to bearer, by delivery.

Sec. 16. "Though a bank have a branch, all its notes shall be signed by the president and countersigned by the cashier of the parent bank; all such notes shall be received in payment of debts to the bank, whether contracted at the parent bank or branch."

If no assignment had been made, it is perfectly clear that the bank would be bound, upon general principles, to take its own issues in payment of debts due the institution. Such would have been their liability without the sections referred to above. The provisions of the statute were intended to stamp the paper with a contract with the holder and the public that it should be taken by the bank as long as it continued to circulate. Under section 15, the bills never could become over due, but they continued to be negotiable for all time, by delivery from hand to hand. The object was to give them a peculiar value as currency, and the legislative authority, representing the people, in granting charters to banks, put these conditions upon them for the protection of the public and the security of the holder. The enactment was a guaranty
3 that the bills should be received in payment of debts due the bank; and, in the language of Judge McLean, with only a verbal

change, in Woodruff v. Trapnell, 10th Howard, 206, "the guaranty included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved 'this note shall be received by the bank in payment of debts.'" "The right of the holder to make payment in this paper arises out of a continuing contract, which is limited in time by the circulation of the notes to be received."

The act of assembly, passed February 12, 1866, referred to above, violated and impaired this contract of guaranty.

The banks accepted their charters with the legislative condition attached, which condition formed a part of the continuing contract which they have made with the petitioners. The insolvency of the bank cannot influence the case, unless the legislation of February, 1866, destroys the condition, which we insist cannot be done without impairing the obligation of the contract, and violating the Constitution of the United States. The fact that they bought the paper at a depreciated price cannot influence the case, because if the assignment is inoperative, as we contend, it is a good offset at its face value. Its main value, after all, was its currency, and this was guarantied, strengthened, and assured by the condition imposed upon it by law.

The public and the holder are entitled to all the benefits arising from the charters of the banks, which were derived from the people, and all the conditions, restrictions, and limitations imposed by the law which was in force at the time the incorporations were created. Mr. Justice Davis, in Furman v. Nicol, 8 Wallace, page 63, which has been published since the argument of this case in the court of appeals of Virginia, has struck the key note of the principles governing this class of
4 cases. He says: It is contended that the repealing act, (let us say the act of February, 1866,) took from those persons who did not at the time hold the paper of the bank, the right to acquire it afterwards, and use it to discharge their debts to the State, [bank?] This construction of the contract would limit the obligation to the person, and withdraw it from the paper. If, as we have endeavored to show, the guaranty attached to the paper itself, and could not be withdrawn from it, then it follows that the notes in circulation at the time of the repeal are not affected by it, and carry with them the pledge of the State to be received in payment of taxes by every bona fide holder. Put the word "bank" in the place of "State," and we would have language as well as principles applicable to the case under consideration.

In fact the principles apply to the case before us more strongly than to the one decided by the supreme court, because it might well be said that public policy and convenience, and the necessity to maintain government, should intervene to protect the State from the obligation to receive depreciated money in discharge of taxes which are levied to support the government and maintain law and order.

The bills of the bank were always due and payable while in circulation, and independently of the statutory provisions referred to, the bank would be bound to take the obligation in payment of debts. Unless the legislature intended that the paper should remain stamped, with the condition that it should for all time while circulating as currency be so taken, sections 15 and 16 were vain and nugatory.

The conclusion then is, as we are bound to give the acts of the legislature the force they are legitimately entitled to, that these provisions were intended to preserve the face value of the bills whenever
5 presented in payment of debts due the bank. Any other conclusion would lead on to the absurd result that the legislative will intended nothing or only to declare a well established rule. Upon

the familiar principles of debt and offset, the notes could be used by a debtor against a demand made by the bank. The legislature intended that this principle should not be disturbed in the event of insolvency or an assignment, and we contend that it has not been disturbed, but that the legislature has only afforded by the act of February, 1866, a more convenient and less expensive mode of winding up the affairs of the bank. The court of appeals, however, has taken a different view of the subject, and has treated the act as abrogating sections 15 and 16. If such is the effect, the obligation of the contract has been impaired, and we are entitled to invoke this court to protect us against a violation of the Constitution of the United States.

Error.

This is the error which the petitioners complain of, and to correct which they apply for a writ of error to the court of appeals of Virginia.

The judgment finds for the plaintiff the debt in the declaration mentioned, and there was drawn in question the validity of the act of the general assembly of Virginia, passed February 12th, 1866, on the ground of its being repugnant to the Constitution and laws of the United States, the said decision being in favor of such validity.

For these and other errors your petitioners pray a writ of error under the 25 section of the judiciary act, to the judgment complained of.

The petitioners, by their counsel.

GEO. WM. BRENT.
C. W. WATTLES.

6 We, George W'm Brent & C. W. Wattles, attorneys and counsellors, practicing in the Supreme Court of the United States, do certify that in our opinion there is sufficient matter for reversing the judgment complained of in the foregoing petition.

GEORGE WM. BRENT.
C. W. WATTLES.

(Indorsed:) Exchange Bank of Va. v. Knox & Bro. et al. Petition for writ of error.

7 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Exchange Bank of Virginia, use of George W. Camp, trustee, plaintiff in error, and John S. Knox, jr., and Robert F. Knox, late co-partners, trading under the firm name of Knox & Brother, and John S. Knox, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the

8 decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendants in error, as by their complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-nine.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Issued 14th June, 1870.

Allowed by—

N. H. SWAYNE.

9 Know all men by these presents that we, John S. Knox, jr., Robert F. Knox, and John S. Knox, as principals, and C. F. Suttle and Lewis McKenzie, as sureties, are held and firmly bound unto the Exchange Bank of Virginia, use of George W. Camp, trustee, in the full and just sum of to be paid to the said Exchange Bank of Virginia, use of George W. Camp, trustee, its certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this fourteenth day of June, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at a supreme court of appeals of the State of Virginia in a suit depending in said court, between The Exchange Bank of Virginia, use of George W. Camp, trustee, plaintiff in error, and John S. Knox, jr., and Robert F. Knox, late co-partners, trading under the firm name of Knox & Brothers, and John S. Knox, defendants in error, judgment was rendered against the said defendants in error, and the said defendant in error, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff in error, citing and admonishing to be and appear at a supreme court of the United States, to be holden at Washington the first Monday of December next.

Now, the condition of the above obligation is such, that if the said defendants in error shall prosecute said writ of error to effect, and an-

swer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) By their attorney, J. S. KNOX, ROB'T F. KNOX, & J. S. KNOX, JR., C. W. WATTLES. [L. S.]

(Signed) C. F. SUTTLE. [L. S.]
(Signed) LEWIS McKENZIE. [L. S.]

Approved by—
(Signed) N. H. SWAYNE, *Asso. Jus. &c.*

10 THE UNITED STATES OF AMERICA:

To the Exchange Bank of Virginia, use of George W. Camp, trustee, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States, to be holden at Washington on the first Monday of December next, pursuant a writ of error, filed in the clerk's office of the supreme court of appeals of Virginia, wherein John S. Knox, jr., and Robert F. Knox, late co-partners, trading under the firm name of Knox & Brother, and John S. Knox, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this day of June, in the year of our Lord one thousand eight hundred and seventy.

N. H. SWAYNE,
Asso. Jus. Sup. Court, U. S.

11 On this day of , in the year of our Lord one thousand eight hundred, and , personally appeared , before me, the subscriber, , and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the , A. D. 18 .

Service of the within citation accepted and acknowledged, and waiver of reapproval of the bond made, and consent given to docket the case at the present term of the court.

H. O. CLAUGHTON,
Att'y for Defendant in Error.

12 Supreme court of appeals of Virginia, Richmond.

EXCHANGE BANK OF VA., FOR, &C.,
vs.
VASS, R. S., &C.

To the W. T. Joynes, judge of the supreme court of appeals of Virginia:

The petition of the Exchange Bank of Virginia, use of George W.

Camp, trustee, respectfully represents: That the petitioner is aggrieved by a final judgment of the circuit court for the city of Richmond, rendered on the first day of August, 1868, in an action of debt, wherein the Exchange Bank of Virginia, for the use of George W. Camp, trustee, was plaintiff, and John S. Knox and John S. Knox, jr., were defendants.

A transcript of the record of the judgment complained of is herewith presented, by which it will be perceived that the case is as follows:

That the Exchange Bank of Virginia, on the day of , made an assignment of all its assets to George W. Camp, trustee, for the benefit of the creditors of said bank. That amongst the assets so assigned was the protested note upon which the said action of debt was brought in the name of the Exchange Bank of Virginia, for the use of the said George W. Camp, trustee.

That, after the institution of said suit, the said defendants, John S. Knox and John S. Knox, jr., with notice of the aforesaid assignment, purchased the bills of the said Exchange Bank of Virginia, which had been issued prior to the making of the note sued on, at a depreciated price, and made a tender of said bills in payment of the said note.

That the said Exchange Bank of Virginia was insolvent, and made said assignment to the said Camp in accordance with an act of the general assembly of Virginia, in that case made and provided.

That the said defendants pleaded the tender aforesaid, and filed with their said plea the amount of note sued upon in the bills of said bank, purchased as aforesaid.

13 That the said defendants pleaded set-off and filed with their said plea the bills of the said bank.

That these facts were set out in a case agreed, and a jury waived, and the matters of law and fact submitted to the judgment of the court. Whereupon the court having considered the same, entered up judgment for the defendants.

Your petitioner assigns the following errors in said judgment:

1. The bills of the Exchange Bank of Virginia, purchased after notice of the assignment by said bank to the trustee Camp, were not an offset to the note of the defendants as against said assignee. A set-off as between the maker and payee acquired after the transfer of an overdue note, though acquired without notice of the transfer of the note, cannot be set-off as against the holder. (Davis v. Miller, &c., 14th Gratt., 1; Johnson v. Bridge, 6 Cowen, 693; Ritchie & Wales vs. Moore, 5 Mun., 388; Anderson v. Van Allen, 12 Johns., R. 343; Johnson v. Bloodgood, 1 Johns. Cas., 51; Goodson v. Cunningham, 12 Mass. R., 193.)

2. An assignment to the trustee for the benefit of the creditors of the grantor is an assignment for value, which protects the assignee from the set-off. (Evans, trustee, vs. Greenhow & als., 15th Gratt., 153; State of Maryland vs. The Bank of Maryland, 6 G. & Johns., 205; Richter vs. Selin, 8 Serg. & Raw., 425.)

3. The offer to pay the debt in the bills of the bank was not a legal tender. The provision in the banking law of the State which provides that a bank shall receive its own bills in payment of debts due the bank, does not have the effect of making the bills of the bank a legal tender. If such was the purpose of the legistature the act is unconstitutional. (Briscoe v. The Bank of the Commonwealth of Kentucky, 11 Peters, 316.)

4. A tender must be made before suit brought. (Law vs. Jackson, 9 Carr., 641; 5 Cow., 248.)

5. The pleas of tender and set-off cannot avail to secure the defendants the protection of the provision of the banking law, which provides

that the bank shall receive its bills in payment of debts due the bank. If this is a defence it could only be made by a special plea.

6. But even if such defence is available under the pleas of tender and set-off, it is no valid defence to this action.

There are many reasons sustaining this conclusion, amongst which are the following:

1. The provision in the code is a law and not a contract. It has nothing of the elements of a contract in it. A contract necessarily implies contracting parties. Who are the parties to this contract, if it be one? Is it answered, the State on one part, and the bank on the other? If so, how can a debtor to the bank, who is no party to the contract, avail himself of its provisions? It is not a contract, it is a law. What is a law? "A rule of civil conduct prescribed by the supreme power of a State;" "statute law is the express written will of the legislature, rendered authentic by certain prescribed forms and ceremonies." Now does not this provision in the banking law of this State answer
14 the definition of a law? The bank is commanded by the supreme power in the State to take its own bills in payment of debts due to the bank. It is a law; and as such is only applicable to the bank. If the debt is not due to the bank the law does not apply. If the State was the only stockholder—in other words, if the State was the bank, then such a provision would be a contract, an agreement between the State and the billholder. (See argument of Lawrence, in Woodruff vs. Tropnall, 10 Howard, 193.)

2. The provision in the code applies only to debts contracted with the bank; in other words, the notes which are payable to the bank, in which the bank is payee.

It would be a perversion of all law and logic to contend that even if this provision in the code be a contract, that it applies to any other than contracts to which the bank is an original party. If it is part of the contract, it must be of a contract with the bank, and with no other party. In other words, if A gives his negotiable note to the bank, promising to pay the bank a certain sum of money, then it is a part of the contract that he may pay the debt in the bills of the bank. Now, if this right to pay in the bills of the bank be a part of the contract which goes with the note into the hands of a purchaser for value, is it not evident that note ceases to be negotiable? For a negotiable note is a "courier without luggage," payable in gold, without any condition or qualification whatsoever. The argument upon this theory would be that the provision in the code is a contract, that upon the face of the note it is a contract with the bank; that the note on its face is notice of the equity, and that the purchaser of the note, even before dishonor, takes it with notice of the equity, and is therefore bound to take the bills of the bank in payment! This is the inevitable conclusion, yet who supposes that the endorsee of such a note, made payable to a bank, who becomes the holder of the note for value, would be obliged to take the bills of the bank in payment?

Again. A gives his negotiable note to B for value received; this is a contract to which the bank is not a party. A's contract is to pay the note in gold. B endorses the note to the bank. By his endorsement, he undertakes that A will faithfully discharge his contract, that, is pay the amount of the note in gold; and if A should fail to do so, that he, B, upon receiving due notice of A's failure, will do what A was bound to do, that is, pay the amount of the note in gold. Yet no one doubts that if the bank is the holder of the note, that either A or B could pay the note in the bills of the bank. The provision is no part of the con-

tract; it is a law, a regulation applicable to, and binding upon, the bank, and upon no other party. And for this reason, the bank was permitted to circulate its bills as currency. The bank would not be allowed to refuse to receive them as currency; the bank was obliged to redeem its bills in gold; the bank was not allowed to refuse its bills and demand gold, the only effect of which would have been to put the debtor to the trouble of presenting the bills for redemption, and with the very gold received from the bank pay its debt to the bank. (8 Watts & Sergeant, 311.)

15 But it may be said that the provision in the code is not a part of the contract made with the bank, but a part of the contract of the bank with its billholder; in other words, that the obligation of the bank to receive its own bills in payment of debts due the bank is the same as if upon each note there was engraven the words: Receivable in payment of all debts due the bank. Who can doubt this to be the case? Nothing is plainer. It is conceded to be true. What then? Is not this the law of the case independent of the provision in the code? Does the provision in the code add to that obligation in the least degree? Certainly not; but in order to avail one's self of the benefit of this provision, two conditions must exist. First, the debt must be due to the bank; and second, while the debt is so due to the bank, the debtor must have acquired the bills of the bank which he tenders in payment, or pleads as set-off.

The provision in the code was not intended to affect the law of set-off. It had but one purpose, and that was to compel the banks to accept and receive their own bills as a legal tender. Any other party could refuse to accept bank bills as a legal tender, and require payment in gold and silver; the banks were prohibited from thus refusing, and for the reasons before stated. And this is all that is meant by the provision in the code.

In the State of New York there is no statutory provision requiring the banks to receive their bills in payment of debts due the banks; but the supreme court, in The Bank of Niagara v. Roosevelt, 9th Cowen, 408, decides that such is the law of the State of New York. That being the law, it is quite immaterial whether it be by statutory provision or otherwise. The law is the same in New York and Virginia. Banks are bound to receive their bills in payment of debts due to them. Now, what is the law as decided by the courts of N. Y. as to the obligation of the assignee of a bank for the benefit of its creditors, to take in payment the bills of the bank purchased after notice of the assignment. The courts in repeated adjudications have decided that a debtor whose obligation has been assigned by the bank to a trustee for the benefit of the bank, cannot, in an action by the trustee upon his obligation, set off the bills of the bank purchased after notice of the assignment. (3 Wendell, 13; 9 Cowen, 408, (notes;) 1 Paige, 585; Divers Receivers vs. Phelps, N. S. Law Register, vol. 1, p. 238.)

In Pennsylvania the banks are compelled to take their own bills in payment of debts due to them, but the assignee of the bank for the benefit of the creditors of the bank, is not obliged to receive the bills of the bank purchased after notice of the assignment. They cannot be set off in an action brought by the assignee. (Northampton Bank v. Ballut, 8 Watts & Sergeant, 311; Horsum v. Rogers, 4 Wright.) The same is the law in New Jersey.

In Ohio there is a statute which provides that the bank, *of* any assignee for the benefit of the banks, shall receive the bills of the bank in

payment of debts due to the bank. This provision is substantially the same as that in the code ; perhaps a little broader.

It has been decided in Ohio under this statute, that the assignee of a bank is not obliged to take the bills of the bank purchased
16 after notice of the assignment. In Pancoast v. Ruffner the Bank of Cincinnati had obtained a judgment against Pancoast. After obtaining the judgment which, according to the Ohio statute, Pancoast had the right to pay (so long as the bank owned the judgment) in the bills of the bank, the Bank of Cincinnati assigned the judgment to the Bank of the United States. The Bank of the United States sued out execution upon the judgment, and Pancoast tendered in payment the bills of the Cincinnati Bank. The Bank of the United States directed the sheriff Ruffner not to receive them. Ruffner proceeded to sell the property of Pancoast under the execution. Pancoast filed his bill in equity, praying an injunction, bringing into court the bills of the Cincinnati Bank, tendered to the sheriff. The court decided that the Bank of the United States was not obliged to receive the bills of the Bank of Cincinnati in payment ; that the statute did not apply to the assignees of a bank. (1 Ohio, 381.)

In Dundas v. Bowler, a debtor to the Bank of the United States executed his notes to the bank, and gave a mortgage on real estate to secure the payment of said notes. The Bank of the United States became insolvent and made an assignment of its assets to a trustee for the benefit of its creditors. The trustee proceeded to foreclose the mortgage, and the mortgagor claimed that, under the Ohio statute, he had the right to pay the debt in the bills of the Bank of the United States. The court decided that the trustee was not obliged to take the notes of the bank in payment ; that the statute did not apply to the assignee of the bank. (3 McLean 397.)

And such is the whole current of authorities with a single exception, if that may be called an exception. In the case of Union Bank of Tennessee v. Ellicott, Morris & Gill, reported in 6 Gill & John., 363, and much relied upon by the defence, the court decided that the trustees were obliged, under the Maryland statute, to take the bills of the bank in payment, though purchased after the assignment. If this case be contrary to the current of decisions in other States, it should yield to the number of authorities to which it is opposed. But it is really quite consistent with those authorities. The statute of Maryland provides that in the event of a bank's refusing to pay specie for its bills, that commissioners shall be appointed to take charge of its assets and pay its debts, &c., and the same statute provides that not only the banks but such commissioners shall receive the bills of the bank in payment of debts due the bank. Now in this case the insolvent bank made an assignment to trustees, and as if recognizing the fact that such trustees were but substitutes for the commissioners authorized by the statute to take charge of the assets of the bank—the bank in making the assignment by resolution of the board, declared that the debtors to the bank should have the privilege of paying their debts in the bills of the bank. This case then differs from the one at bar in these two particulars. First, the statute of Maryland provides that not only the bank, but, in the event of its becoming insolvent, the commissioners or trustees of
17 the bank, shall take the bills of the bank in payment of debts due the bank. Secondly, the very deed itself, upon its face provided that the debtors of the bank should have the privilege of paying their debts in the bills of the bank.

These are the authorities of the State courts upon this point. This

question has been incidentally before the Supreme Court of the United States. In the case of the Planters' Bank v. Sharp, reported in 6th Howard, 301, this point was decided by implication. This was a case in which a bank chartered by the State of Mississippi, not prospering, its bills depreciated in value. The legislature, in order to secure to the debtors of the bank the privilege of paying their debts in the depreciated bills of the bank, passed two statutes, the first prohibiting all assignments by the bank, and the second requiring the bank to take its depreciated bills in payment of debts due the bank. The court decided that the act requiring the bank to take its own bills in payment of debts due the bank, was constitutional, and only declaratory of the law as it theretofore existed; nay more, that the legislature might have perhaps gone further, and provided that promissory notes, though assigned by the bank, should still be open to set-off by their debtors of any of the bank's bills, which they then held. "This," says the court, "would have been equitable, and no more probably than they would be entitled to, on common law principles, if an assignee purchased, as hereafter the notes fell due, and with the knowledge of the existence of such a set-off." This is an expression of the opinion of the Supreme Court; that the provision in the code is only declaratory of the common law, and that the assignee of a bank would not be affected by offsets purchased after the assignment, with notice thereof. And it goes on to say that the statute of the State of Mississippi was obnoxious, because it enabled the debtors of the bank to make payment in the depreciated bills of the banks, bought up for that purpose, and thus to gain an undue advantage over set-offs by other debtors in other matters. This is just the effect which the construction placed upon our statute by the counsel for the defendants would have. But this act was supplemented by another act, prohibiting the bank from making any assignment of its assets. Now the object of this first act was to secure to the debtors of the bank the privilege which the last act gave them, that is to pay their debts in the bills of the bank. But if the assignees of the bank were bound, just as the bank was, to receive the bills of the bank in payment, what necessity would there have been for the act which prohibited the transfer by the bank. The legislature recognized the fact that the assignee of the bank would not be bound to take the bills of the bank, and therefore to secure this privilege, which would be lost in the event of an assignment, the prohibition against assignment was enacted. The court decided that such prohibition was unconstitutional, and that the assignee would not be obliged to take the bills of the bank purchased after notice of the assignment. Such is supposed to be the meaning of the decision of the court.

The point involved in this case was under consideration in the Supreme Court of the United States in the case of The United States vs.
18 Robertson, reported in 5 Peters, 641. This was a case under the Maryland statute before alluded to, and shown to be materially different from the Virginia act, upon the point whether or not the debtors of the bank could pay a judgment against them as garnishees in an attachment brought by the United States. This was the case. The Bank of Somerset in the State of Maryland became indebted to the United States. The United States instituted a suit against the Bank of Somerset, and under a provision of the law of Congress summoned as garnishee the debtor of the bank. By the said law of Congress it is provided that judgment for the said debt shall be entered in favor of the United States in the same manner as if it had been due and owing the United States. Amongst others, this point arose, when

such judgment was obtained in favor of the United States could the debtors of the bank pay said judgment in the bills of the bank purchased after the judgment was obtained. Upon this point the judges of the circuit court for the district of Maryland were equally divided, and upon certificate of such division the case came to the Supreme Court. Upon this point the Supreme Court of the United States was also equally divided. Chief Justice Marshall, delivering the opinion of the court, says: "So far as these notes were in possession of the debtor at the time he was summoned as garnishee, they form a counter claim which diminishes the debt due the bank to the extent of that counter claim; but the residue becomes a debt to the United States for which judgment is to be rendered. May this judgment be discharged by the paper of the bank? On this question the court is divided." Three of the judges were of opinion that the right to pay the debt (under the Maryland statute) in the notes of the bank does not enter into the contract. A note given to pay money generally, is a note to pay in legal currency; and the right to discharge it with particular paper, is an extrinsic circumstance depending on its being due to the person or body corporate responsible for that paper, which right is terminated by a transfer of the debt.

Three other judges were of the opinion that, by the nature of the contract and by the operation of the act of Maryland upon it, an original right existed to discharge the debt in the notes of the bank, which original right remains in fact against the United States, because they came in as assignee in law, not in fact, and who must therefore stand in the place of the bank.

Could there be a clearer sequitur than that if the United States had come in as assignee in fact, under a deed from the bank, that they would not have been bound to take the bills of the bank?

Lastly. The purpose of the legislature would be defeated if the construction relied upon by the counsel for the defendants be adopted.

There is no equity in the pretensions of the defence. The bank is totally insolvent. It has no interest whatever in this controversy. To require these defendants to pay their debt in currency would be no hardship upon them. They received full value; they ought to pay full value. If they are allowed to pay in the bills of the bank, they
19 will be in effect receiving dollar for dollar for the bills held by them, while other creditors will get little or nothing; whereas the act of assembly provides for an equal distribution of the assets of the bank. Again, if they are allowed to pay a note for which they received full value, at 25 cts. in the dollar, by which the trustee will be enabled to pay the other creditors who gave full value, only 25 cents in the dollar, manifest injustice will be done, the very injustice which the legislature intended to prevent.

For these errors your petitioner prays a writ of error to said judgment.

The Exchange Bank of Virginia, use of Geo. W. Camp, trustee,
By H. O. CLAUGHTON, *Counsel.*

I, H. O. Claughton, an attorney practising in the supreme court of appeals of Virginia, do certify that, in my opinion, there is sufficient matter for reversing the judgment complained of in the foregoing petition.

H. O. CLAUGHTON.

Writ of error awarded according to the prayer of the petition. Bond to be given in penalty of $200.

Sept. 5th, 1868.

W'M T. JOYNES.

To the CLERK of supreme court of appeals.

VIRGINIA:

Pleas before the circuit court of the city of Richmond, held at the State capitol in the said city, on Saturday, August 1st, 1868.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of the circuit court of the county of Alexandria, on the first Monday in October, in the year 1867—

Came the Exchange Bank of Virginia, who sues for the use of George W. Camp, trustee, by its attorneys, and filed its declaration against R. S. Vass, B. F. Vass, John S. Knox, jr., and Robert F. Knox, late copartners trading under the firm name of Knox & Brother, and John S. Knox, of a plea of debt; which declaration is in these words and figures, to wit:

Declaration.

In the circuit court of Alexandria County, Oct. rules, 1867.

ALEXANDRIA COUNTY, *to wit:*

The Exchange Bank of Virginia, who sues for the use of George W. Camp, trustee, complains of R. S. Vass, B. F. Vass, John S.
20 Knox, jr., and Robert F. Knox, late copartners trading under the firm name of Knox & Brother, and John S. Knox, who have been
page 2 duly summoned, &c., of a plea, that they render to the plaintiff $1,000, principal, and $2 15 charges of protest of the note herein mentioned, with interest thereon from the 1st day of June, 1861, the date of said protest, which they owe to and unjustly detain from the plaintiff. And thereupon the plaintiff says that heretofore, to wit, on the first day of March, 1861, the said R. S. Vass made and signed a note bearing date the day last mentioned, by which he promised to pay, ninety days after the date thereof, one thousand dollars, to the order of B. F. Vass, at the Bank of Baltimore, Maryland; and after the said note was made, and before it became payable, the said B. F. Vass endorsed the said note to the said John S. Knox, jr., and Rob't F. Knox, late copartners trading under the firm name of Knox & Brother; and the said John S. Knox, jr., and Rob't F. Knox, afterwards, and before the said note became due and payable, endorsed the said note to the said John S. Knox by their firm of Knox & Brother; and the said John S. Knox afterwards, and before the said note became due and payable, endorsed the said note to the plaintiff. And the plaintiff avers
page 3 that afterwards, when the said note became payable, according to the tenor and effect thereof, to wit, on the 1st day of June, 1861, the said note was duly presented at the Bank of Baltimore, Md., for payment thereof, and payment of the sum of money therein specified was then and there duly required, and the payment so required was not made, but was wholly refused. And thereupon the said note was duly protested for non-payment, to wit, on the 1st day of June, 1861, the charges of which protest amount to $2 15; of all which premises,

and especially the said protest, the said B. F. Vass, John S. Knox, jr., Rob't F. Knox, and John S. Knox had due notice. By virtue whereof the said R. S. Vass, B. F. Vass, John S. Knox, jr., and Rob't F. Knox, late copartners under the firm name of Knox & Brother, and John S. Knox, are liable to the plaintiff; and there is right of action for the plaintiff against them for the principal, charges of protest, and interest above demanded; and the same and every part thereof remains unpaid, though the same has long since been due; and the said defendants R. S. Vass, B. F. Vass, John S. Knox, and Rob't F. Knox, late copartners under
page 4 the firm name of Knox & Brother, and the said John S. Knox, have been often requested to pay the same, but have refused so to do, and still do refuse, to the damage of the plaintiff $500; and therefore the plaintiff sues, &c.

CLAUGHTON, *p. q.*

Whereupon the defendants John S. Knox, jr., and John S. Knox being summoned, and not appearing, it was ordered that judgment be entered against them in favor of the plaintiff for the debt, interest, and charges of protest in the declaration mentioned, unless the said defendants John S. Knox, jr. and John S. Knox should ap-
21 pear at the then next rules and answer the plaintiff's action. And this suit was continued for service as to the defendant Robert F. Knox, until the then next rules, and abated by the return of the sheriff as to the defendants R. S. and B. F. Vass.

And at another day, to wit, at rules held in the clerk's office of the said circuit court of Alexandria County, on the first Monday in November, 1867:

Came again the plaintiff, by its attorney, and the defendants John S. Knox, jr., and John S. Knox, still failing to appear, it was or-
page 5 dered that the conditional judgment entered herein at the last rules against them, stand confirmed; and this suit was continued for service of process as to the defendant Robert F. Knox until the then next rules.

And at another day, to wit, at a circuit court of the county of Alexandria, held at the court-house of said county, on Monday, the 11th day of November, 1867:

Came as well the plaintiff as the defendants John S. Knox, jr., and John S. Knox, by their attorneys, and this suit was docketed as to the said John S. Knox, jr.; and John S. Knox.

And at another day, to wit, Saturday, November 23rd, 1867:

Came again as well the plaintiff as the defendants John S. Knox, jr., and John S. Knox, by their attorneys, and thereupon the said defendants, John S. Knox, jr., and John S. Knox, pleaded nil debet, and put themselves upon the country, and the plaintiff likewise. Whereupon it was ordered that the judgment obtained in the office against the said defendants John S. Knox, jr., and John S. Knox, be set aside.

And at another day, to wit, at a circuit court continued and
page 6 held for Alexandria County, at the court-house of said county, on the 7th day of February, 1868:

Came as well the plaintiff as the defendants John S. Knox, jr., and John S. Knox, by their attorneys, and thereupon the said defendants filed their plea of tender and offsets, together with fourteen hundred

and five dollars in notes of the Exchange Bank of Virginia, which they tender in payment of the plaintiffs' claim in this suit.

The pleas of tender and offsets above referred to, are in these words and figures, to wit:

Plea of tender.

In the circuit court for Alexandria County.

THE EXCHANGE BANK OF VIRGINIA
vs.
R. S. VASS, B. F. VASS, JOHN S. KNOX, JR., and Robert Knox, partners under the name and style of Knox & Bro.

22 And for further plea the defendants say, that the plaintiff ought not to recover any damages or costs in the above action, which accrued after the tender hereinafter mentioned, because they say
page 7 that after the time when the sum of money in the declaration mentioned became due and payable, and after the commencement of this suit, to wit, on the 7th day of February, 1868, they, the said defendants, were ready and willing, and then and there tendered and offered to pay to the said plaintiff the sum of $1,403, being the principal sum declared on, and interest thereon, and the costs of protest in the declaration mentioned, in the promissory notes of the said bank, signed by the president, and countersigned by the cashier thereof, and were circulating as currency, and which were duly issued by said bank prior to the indebtedness of said defendants to said plaintiff now sued on, to wit, prior to 1st Jan'y, 1865, to receive which of the said defendants the said plaintiff then and there wholly refused; and the said defendants now bring the said sum of $1,403 so tendered into court, now ready to be paid to the said plaintiff, if it will accept the same; and this he is ready to verify, Whereupon he prays judgment.

BRENT & WATTLES,
For Defendants.

Offsets.

page 8. EXCHANGE BANK OF VIRGINIA
vs.
R. S. VASS, B. F. VASS, AND KNOX & BRO.

Action of debt in the circuit court of Alexandria County.

Specification of offsets filed with the plea. Promissory notes of the said bank signed by its president, and countersigned by its cashier, $1,403, being the am't of principal and interest sued on, and costs of protest.

The parties in this cause then waiving a jury, submit the following statement of facts, to wit:

That the note sued on was duly executed, endorsed, protested, and notice of protest duly given; that the Exchange Bank of Virginia is insolvent, and that on the day of , 1866, under the authority and in accordance with an act of the general assembly of Virginia, passed February 12th, 1866, entitled an act requiring the banks of this Commonwealth to go into liquidation—made a deed of trust to the said

George W. Camp, by which the said bank assigned to the said Camp, for the benefit of the creditors of the said bank, all the assets
page 9 of the said bank, including the note sued on; which said deed is in these words and figures, to wit:

23 *Deed of trust.*

Whereas, at a general meeting of the stockholders of the Exchange Bank of Virginia, held in the city of Norfolk on the 6th day of June, 1866, the following resolutions were adopted:

Whereas, at the last meeting of the stockholders of the Exchange Bank of Virginia, on the 29th of November, 1865, they were of the opinion that an assignment of the assets of said bank should be made; and whereas the stockholders in this meeting concur fully in that opinion; and whereas since the last meeting an act of assembly has been passed authorizing the president and directors to make a deed of its assets:

Be it resolved, That the president and directors of the Exchange Bank of Virginia make, or cause to be made forthwith, a deed conveying all the assets, real and personal, of said bank, and providing in said deed that the proceeds of such assets shall be distributed amongst all persons, corporations, and associations, at the time
page 10 such deed shall be executed in conformity with the act of the general assembly of Virginia, passed February 12th, 1866, entitled "An act requiring the banks of this Commonwealth to go into liquidation."

Resolved, That considering the long and faithful services of G. W. Camp, the cashier of said bank, his familiarity with the business, credits, and assets of said bank, the stockholders esteem him the most suitable and reliable person for the performance of the trust aforesaid, and they instruct the president and directors to constitute him the trustee.

Resolved, That before he enters upon the duties as trustee, he shall be required to give bond with security to the said president and directors in the penalty of one hundred thousand dollars for the faithful performance of said duties.

And whereas the board of directors of said bank in compliance with the above recited resolutions of the stockholders, adopted a resolution on the 14th day of June, 1866, requiring said resolutions of the stockholders to be carried into effect:

Now this indenture, made this 12th day of July, in the year of
page 11 our Lord one thousand eight hundred and sixty-six, between the Exchange Bank of Virginia of the one part, and the said George W. Camp, of the city of Norfolk and State of Virginia, of the other part, witnesseth: That the said Exchange Bank of Virginia, for and in consideration of the premises, and of the sum of ten dollars in hand paid by the party of the second part, before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, and transferred, and by these presents doth grant, bargain, sell, assign, and transfer unto the said George W. Camp, party of the second part, all the assets of said bank of every kind and description, real, personal, or mixed, wheresoever found and in whosesoever hands, all specie, bullion, exchange, or balances, all debts due to said bank of every kind and description in Virginia or elsewhere, by any and all person or persons, corporations, and associa-
24 tions whatever, and however evidenced; all the real estate, lots and

parcels of land, with the banking and other buildings, and im-
page 12 provements thereon, the property of the said bank, located in Petersburg, Clarksville, Abingdon, and Lynchburg, in Virginia, or Weston, in West Virginia, or wheresoever else such real estate may be, whether within the State of Virginia or elsewhere, among which are the following pieces or parcels of land, viz:

1. One certain lot, piece, or parcel of land lying and situate on the north side of Bank street, in the city of Petersburg, bounded on the west by the banking-house lot of the president and directors of the Bank of Virginia; on the north by the lot of Mrs. Polly Ann Dobbin; on the east by Baird's alley; on the south by Bank street, it being the same lot conveyed to the Exchange Bank of Virginia, by J. F. May, surviving trustee, by deed bearing date the 15th day of February, 1839, and duly recorded.

2. Also the interest of James S. Foley, in and to a certain lot, with the buildings and improvements thereon, situated on the north side of Washington street, in the city of Petersburg.

3. Also another lot or parcel of land in said city, and bounded
page 13 as follows: on the east by Union street; on the south by Washington street; on the west by the lot above mentioned, and on the north by Paul's lot; the last two lots being the same conveyed to the said Exchange Bank of Virginia by Jno. Pegram and Luke Whyte, trustees, by deed bearing date the 5 day of January, 1843, and of record in the clerk's office of Petersburg.

4. The lot and banking house in Lynchburg, Virginia, situate at the junction of 2nd or Main street and first alley, fronting thirty-nine feet on the street, and running back on the alley 132 feet, it being the same lot conveyed to the said Exchange Bank of Virginia by John G. Meem and Eliza, his wife, by deed bearing date the 13th day of November, 1857, and of record in the clerk's office of the hustings court of Lynchburg.

5. A certain lot or parcel of land situate, lying, and being upon the south side of Prince street, and the west side of Water street, in the town of Alexandria, the same being a part of lot or half acre of ground described as No. 64 in the plan of said town, conveyed to the Farmers' Bank of Alexandria by James Hewitt Hooe and wife, by deed
page 14 dated the 13th March, 1811, and by said Farmers' Bank of Alexandria to the Exchange Bank of Virginia, by deed of the day of July, 1847, and duly recorded in Alexandria County.

6. An undivided interest in a lot of land and buildings thereon, on the north side of Cameron street, between Pitt and Royal streets, in the town of Alexandria, which was conveyed by S. Ferguson Beach, trustee, to the Bank of the Old Dominion, and the Exchange Bank of Virginia, as tenants in common, by deed dated 21st day of December, 1859, and duly recorded in book No. 3, page 242, land records of Alexandria County.

7. A certain lot of land, being the northwest quarter of that
25 square which is bounded on the north by Wilkes street, on the east by Alfred street; on the south by Gibbon street, and on the west by Patrick street, in the town of Alexandria.

8. Also, another lot of land, which is the square bounded by Fairfax, Water, Jefferson, and Greene streets, being two acres, more or
page 15 less; which said last two lots of land were conveyed to the Exchange Bank of Virginia, by William H. Irwin and wife, by deed bearing date the 21st day of August, 1855, and duly recorded in Alexandria County.

9. One undivided third part of one square of land with buildings on the same, bounded by Wilkes, Gibbon, Pitt, and St. Asaph streets, (except one lot, parcel of said square, fronting 22 feet on St. Asaph street, and running back 118 feet 5 inches,) the said lot, with the exception afor's'd, being property belonging in equal undivided shares to the three corporations of the Farmers' Bank of Virginia, the Bank of the Old Dominion, and the Exchange Bank of Virginia.

10. One undivided third part of a house and lot on the south side of King street, between Washington and Columbus streets, the said house and lot belonging, in equal undivided shares and proportions, to the three banks last above mentioned.

11. A certain other lot or parcel of land, with the buildings and improvements thereon, in the town of Abingdon, and State of Virginia, designated in the plan of said town as lot No. 11, fronting on Main street, and running back to the alley, bounded on the east by the
page 16 property belonging to John D. Mitchell's estate, and on the west by property sold to said bank by Geo. V. Litchfield, the deed for the same having been executed on the 6th February, 1866, by Charles S. Beken and others.

12. A certain other lot of land adjoining the one last hereinbefore described, on the north side of Main street, in the town of Abingdon, and State of Virginia, conveyed to the said Exchange Bank of Virginia by Geo. V. Litchfield and Rachel D., his wife, by deed bearing date the 26th day of December, 1860, and duly recorded in the county court of Washington, reference to which and all other deeds hereinbefore recited is hereby made for a more full and perfect description of the real estate hereby conveyed, it being the purpose and intent of the party of the first part to convey all their assets of every kind and description, real and personal, in Virginia, West Virginia, or elsewhere, for the purposes hereinafter mentioned, to the party of the second part. And full
page 17 power and authority is hereby given to said party of the second part, to appoint such agent or agents as he may deem necessary to take care of the effects and property of the said bank, and to collect and realize its assets and debts; to appoint such attorney or attorneys-in fact, with power of revocation, and to employ such counsel in prosecuting or maintaining the rights of the said party of the first part, as in his opinion may be expedient in the premises.

In trust, nevertheless, and for the following intents and purposes, and none other: That the said George W. Camp, trustee as afore-
26 said, or his attorney or attorneys-in-fact, specially appointed for that purpose, shall sell all the real property of the said bank hereby conveyed, wherever it may be situated, at such time or times and places, and on such terms, at private or public sale, for cash or on credit, as he may deem advisable; that he may elect to receive in payment therefor, or to sell either for gold, United States Treasury notes or securities, national bank notes, or notes of said Exchange
page 18 Bank of Virginia, as he may think best for the interests of all parties concerned, and always with special reference to the purposes of this trust.

And if the said party of the second part shall sell at public sale, that due and sufficient notice shall be given in such convenient newspapers published in the vicinity of the property, as such trustee, or his attorney-in-fact, may select; that the said party of the second part shall likewise proceed to sell or dispose of all bullion, uncurrent notes of other banks, States, or corporations, and all other personal property hereby

conveyed, on such terms and conditions as he may deem most conducive to the interest of the trust, and shall proceed within reasonable time to collect all debts of every kind and description herein conveyed and due to the said Exchange Bank of Virginia; and in so doing to use the corporate name of the bank, with all its corporate rights and privileges, in recovering any monies or other property due or belonging to the same; that he may compound or compromise with those who may be indebted to the bank, upon such terms as the bank itself might
page 19 do if this deed had not been executed, and the said party of the second part may regard as conducive to the interests of the trust; and out of the proceeds of the sales of the property hereby conveyed, and of the assets of the said bank hereinbefore referred to, the said Geo. W. Camp, trustee as aforesaid, shall first pay all reasonable charges and expenses incurred in the execution of this trust, including the costs of advertising and selling the property hereby conveyed; the necessary law charges for collecting debts and defending suits against the said bank, or the said party of the second part, the commissions of the said party of the second part, at the rate of two and a half per cent. on the amount received and disbursed, the salaries of the officers of the said bank and its branches, which may be due and unpaid, the necessary expenses of maintaining the corporation of the bank while in process of liquidation, and a reasonable compensation to such agent or agents as may be appointed by said trustee in carrying out the provisions of this deed; and the residue thereof shall from time to
page 20 time, and in accordance with the provisions of the act of the general assembly of Virginia hereinbefore recited, shall distribute pro rata amongst all persons, corporations, and associations, according to the legal rights and priorities of such persons, corporations, and associations at the time such deed shall be executed; and the balance, if any, shall distribute ratably amongst the stockholders of the Exchange Bank of Virginia. And the said party of the second part is hereby required to give notice, by publication in such papers as may be
27 deemed best to the creditors of the said bank, whether as noteholders, depositors, or otherwise, requiring them to present their respective claims to the trustee, or to such agent or agents as may be designated, and at such places, and within such time or times as may be deemed sufficient and proper.

And should it be found necessary by the party of the second part in carrying out the provisions of this deed according to the true intent and purpose thereof, he may, at his discretion, file a bill in
page 21 chancery to have the legal rights and priorities of the creditors of said bank settled and adjudicated. And the said party of the second part is further authorized and empowered, if in his opinion conducive to the interests of the trusts, to exchange or sell the coin of the bank, or such part thereof as may be expedient, for bank notes of other banks, or United States Treasury notes; and in order to prevent the great costs and delays that would be caused by the institution of suits to determine the liability and indebtedness of said bank in cases not now adjusted and ascertained, it is further provided that the said trustee may admit and allow as a valid claim against the said bank, intended to be secured by these presents, such claims and demands other than those founded upon the circulating notes of the said bank, as the board of directors may from time to time, upon a submission to them by the trustee, admit and allow to be due and owing by the said bank, and for which it was justly liable at the time of the execution of

this deed, and may accept and receive from any of the debtors
page 22 of the said bank such amount or sum as the said board may in like manner admit and determine to be due and owing to the said bank.

And it is further provided that, in case the said trustee should encounter any opposition, difficulty, or delay in obtaining from any person or persons, corporations, or associations, the possession of so much of the real and personal estate of the said bank, its coin, bullion, credits or assets, as has been committed to the management of its branch at Weston, in the State of West Virginia, or which now be in the possession or under the control of the said branch, or which may be held by any person or persons, corporations, or associations, exercising, or claiming to exercise, any control over the same, or any part thereof, the said trustee may, in order to prevent the costs, charges, and delays resulting from the institutions of suits at law or in equity, to establish such rights and claims, accept and receive such satisfaction of any of the said claims and demands as the said board of directors may
page 23 from time to time, upon such submission to them by the said trustee as aforesaid, advise and approve.

And it is further herein declared and provided, that these presents being made in strict reference to the act of the general assembly aforesaid, and with intent to be in all respects conformable with its provisions, the said trustee shall comply with all the requirements of the said act, and do and perform all that is therein appointed and required to be by him done and performed.

28 Witness the corporate seal of the said Exchange Bank of Virginia, and the signature of the president thereof, John S. Millson, and the signature and seal of the said trustee, Geo. W. Camp.

{SEAL OF THE EXCHANGE BANK OF VIRGINIA.}

JOHN S. MILLSON,
Pres't Exchange Bank of Virginia.
G. W. CAMP. [SEAL.]

[Internal rev. stamp, $2.] [Internal rev. stamp, 60 c'ts.] [Internal rev. stamp, 5 c'ts.]

COLLECTOR'S OFFICE, 2D DISTRICT OF VIRGINIA.

On the application of John S. Millson, who, as president of
page 24. the Exchange Bank of Virginia, has signed this instrument, not previously issued or used, being required, under the provisions of section 162 of the act of Congress, approved July 4th, 1864, entitled "An act to provide internal revenue for the support of the Government," &c., to give opinion whether or not the same is chargeable with any stamp duty, and being of opinion, after examination of the same, that the said instrument is so chargeable, I have, on payment therefor, affixed and cancelled the proper stamps, said instrument being chargeable only with the duty denoted by the stamps so affixed.

SIMON STONE,
Coll. 2nd District of Va.

NORFOLK, *July 12th*, 1866.

CORPORATION OF THE CITY OF NORFOLK, *to wit:*

I, John T. Hall, a notary public for the corporation aforesaid, in the State of Virginia, do certify that John S. Millson, whose name is signed to the writing above, bearing date on the 12th day of July, 1866,
page 25. as president of the Exchange Bank of Virginia, has acknowledged the same, before me in my corporation aforesaid, to be the act

and deed of the Exchange Bank of Virginia, and acknowledged the within seal to be the corporate seal of the said Exchange Bank of Virginia.

Given under my hand this 12th day of July, 1866.

JOHN T. HALL,
Notary Public.

[Internal rev. stamp, 5 c'ts.]

In the clerk's office of the court of the corporation of the city of Norfolk, on the 13th day of July, 1866:

This deed was presented and acknowledged by G. W. Camp, trustee, and with the certificate annexed of the acknowledgment thereof by Jno. S. Millson, president of the Exchange Bank of Virginia, parties thereto, before a notary public, is admitted to record.

Teste: HENRY M. BOWDEN, *C. C.*

29 Recorded and examined.

H. M. BOWDEN, *C. C.*

page 28. Virginia: Clerk's office, Alexandria County court, August 11th, 1866.

This deed was received in the office, and, having been acknowledged before a notary public and the clerk of the corporation court for the city of Norfolk, admitted to record.

Teste: JEFF. TACEY, *Clerk.*

A copy.

Teste: J. TACEY, *Clerk.*

That the bills of said bank, filed with the pleas, were purchased by the defendants after the said assignment by the deed aforesaid was made and duly recorded, and the defendants had notice thereof, at a depreciated price. That the said bank bills, filed with the pleas and brought into court and tendered in payment, were issued by the said bank prior to the execution of the note sued on, according to law, and are the genuine issues of said bank; and the court is authorized to draw all such inferences from the facts here agreed as a jury might do if one were sworn.

page 27. If, upon this statement of facts, the law is for the plaintiff, then judgment shall be entered up for the plaintiff for the amount of said note, principal, charges of protest, and interest, as demanded. If the law is for the defendants, judgment shall be entered for costs up to the time of the plea and tender.

A copy.

Teste: J. TACEY, *Clerk.*

And at another day, to wit:

Virginia: In the circuit court of Alexandria, in vacation.

EXCHANGE BANK OF VIRG'A, WHO SUES FOR the use of G. W. Crump, *vs.* JOHN S. KNOX AND JOHN S. KNOX, JR.	In the circuit c't of Alexandria County.

The judge of this court being so situated as to render it improper, in

his judgment, for him to decide or to preside at the trial of the above cause, it is now, in vacation, ordered that the said suit be removed to the circuit court for the city of Richmond.

Witness my hand this 18th day of Feb'y, 1868.

H. W. THOMAS,
Judge 9th Circuit of Va.

30 [page 28. And now at this day, to wit: At a circuit court of the city of Richmond, held at the State capitol in the said city, on Saturday, the 1st day of August, 1868, being the same day and year first herein written:

Came again the parties, by their attorneys, and the papers in this cause having been removed hither by an award of the judge of the circuit court of the county of Alexandria, by consent it is ordered that the same be placed upon the docket of this court. The said parties then waived their right to have a jury for the trial of this cause, and agreed that the whole matter of law and fact may be heard and determined, and judgment given by the court: whereupon a statement of the facts agreed having been filed and made a part of the record, as appears by a statement thereof signed by the counsel for the parties, and the matters of law arising upon the facts agreed having been argued and duly considered, the court is of opinion that the law is for the defendants; therefore it is considered by the court that the plaintiff take nothing by its bill, but that the defendants go thereof without day, and recover against the plaintiff their costs by them herein incurred up to the 7th day of February, 1868, being the day on which the defend-

page 29. ants filed the plea of tender herein.

MEMO.—To an opinion of the court this day given against the plaintiff, it, by its counsel, excepted, and tendered its bill of exceptions, which is received, signed, and sealed by the court, and ordered to be made a part of the record in this cause, and the same is in these words and figures, to wit:

Plaintiff's bill of exceptions.

EXCHANGE BANK OF VA. }
vs. }
JOHN S. KNOX, &C. }

Be it remembered that this case being called and coming on to be heard by the court upon the facts contained in the case agreed and the record in the case, and the court being of the opinion that the law was for the defendants, doth so decide; to which opinion of the court, the plaintiff by counsel excepts, and prays that this his bill of exceptions be signed, sealed, and reserved to him, which is done accordingly.

JOHN A. MEREDITH. [SEAL.]

A true transcript of the record.
Teste:

GEO. L. CHRISTIAN, *D. C.*

31 VIRGINIA:

At a supreme court of appeals held at the city hall, in the city of Richmond, on the 25th day of May, 1870.

THE EXCHANGE BANK OF VIRGINIA, USE OF George W. Camp, trustee, plaintiff,
against
JOHN S. KNOX, JR., AND ROBERT F. KNOX, LATE copartners, trading under the firm name of Knox & Brother, and John S. Knox, defendants.

Upon a writ of supersedeas to a judgment recovered by the defendants against the plaintiff, in the circuit court of the city of Richmond, on the first day of August, 1868.

This day came the parties, by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous; therefore it is considered by the court, that the same be reversed and annulled, and that the plaintiff recover against the defendants the costs, by the said plaintiff expended in the prosecution of the writ of supersedeas aforesaid here; and this court proceeding to enter such judgment as the said circuit court ought to have entered, it is further considered, that, upon the statement of facts agreed in the case, the law is for the plaintiff, and that the said plaintiff recover against the defend-
32 ant one thousand and two dollars and fifteen cents, with interest thereon from the first day of June, 1861, till payment, the principal, charges of protest, and interest in the declaration mentioned, and the costs by the said plaintiff expended in the prosecution of said suit in the said circuit court; and the defendant, John S. Knox, jr., and Robert F. Knox, having filed their petition to this court, representing that since the rendition of the judgment aforesaid they have been adjudicated bankrupts, under the act of Congress passed on the second day of March, 1867, and have received their certificates of discharge, which, or copies of which, were presented with said petition, and praying that this court in its judgment reversing the said judgment of the said circuit court, would make such provision as would protect them from any execution that might be issued upon the same; upon consideration thereof, it is ordered that no execution be issued upon the said judgment without a previous order to that effect, made by the said circuit court, after reasonable notice to the said defendants to appear and show cause, if any they can, against it.

Which is ordered to be certified to the said circuit court.

And, on the motion of the defendants, John S. Knox, jr., and Robert F. Knox, it is ordered that they have leave to withdraw the original certificates of discharge filed with the said petition, on leaving copies thereof.

Pl't's costs, $48 40. A copy.

Teste:

M. T. STARKE, *Clk.*

33 I, M. T. Starke, clerk of the supreme court of appeals, do hereby certify that the foregoing record and judgment of the supreme court of appeals of Virginia, is a true copy.

Given under my hand (there being no seal of court) this 27th day of May, 1870.

M. T. STARKE, *C. C.*

I, Richard C. L. Moncure, president of the supreme court of appeals

of Virginia, hereby certify that M. T. Starke, whose name is signed to the above certificate, is clerk of the said supreme court of appeals of Virginia, and that said attestation is in due form of law.

Given under my hand this 27th day of May, 1870.

R. C. L. MONCURE.

34 Writ of error allowed on the within record, returnable to next term Sup. Court U. States.

S. P. CHASE,
Ch. Jus. U. States.

35 STATE OF VIRGINIA,
City of Richmond, to wit:

I, M. T. Starke, clerk of the supreme court of appeals of the State of Virginia, in obedience to the mandate of a writ of error, awarded by the Supreme Court of the United States, dated the 14th day of June, 1870, in the case of The Exhange Bank of Virginia, use of George W. Camp, trustee, v. John S. Knox, jr., and Robert F. Knox, late copartners, trading under the firm name of Knox & Brother and John S. Knox, which is herewith returned, do hereby certify that the printed pages hereto annexed, numbered from one to nineteen inclusive, and the manuscript copy of the final judgment of said court also hereto annexed, contain a true transcript of the record in the above-mentioned case as the same remain on the files of the supreme court of appeals of the State of Virginia. I further return the citation and copy of the bond.

In testimony whereof I have hereunto subscribed my name as clerk of the supreme court of appeals of Virginia, (there being no official seal of said court,) this ninth day of January, 1871.

M. T. STARKE, *C. C.*

(Indorsement on cover:) No. 500. John S. Knox, jr., & Robert F. Knox, late copartners as Knox & Brother, and John S. Knox, plaintiffs in error, vs. The Exchange Bank of Virginia, use of George W. Camp, trustee. Virginia sup. ct. of appeals. Filed 7th February, 1871.

In the Supreme Court

OF THE

UNITED STATES.

JOHN S. KNOX and ROBERT F. KNOX, late copartners trading under the firm name of KNOX & BRO., and JOHN S. KNOX, Plaintiffs in Error.

vs.

THE EXCHANGE BANK OF VIRGINIA, use &c., Defendant in Error.

On Motion to Dismiss for Want of Jurisdiction.

This case comes up upon writ of error to the Court of Appeals of Virginia, and jurisdiction is claimed under the 25th section of the Judiciary Act of 1789—though upon what grounds is not quite apparent upon the reading of the petition.

The record shows that the case decided by the Court below, was an action upon a protested negotiable note—that the pleas to said action were nil debit—tender and offsets—and that these were the only issues in the case, and that the judgment of the Court is solely responsive to these issues.

The facts agreed briefly stated are as follows:

The 15th and 16th sections of the Banking law of the State of Virginia—which may be considered as part of the Charter of the Bank provided that notes issued by the President and countersigned by the Cashier, shall be obligatory upon the Bank, and that all such notes shall be received in payment of debts due the Bank. The legislature in granting the charter reserved expressly the right to amend, alter or repeal the same.

The most of the Banks in Virginia having become insolvent, the Legislature by an act passed February 12th 1866, authorized the insolvent banks to make assignments to trustees for the benefit of the creditors of the Banks, according to their respective priorities at the time such assignment should be made. It is not contended that the Bank could not have made such assignment without the authority of the Legislature.

The Exchange Bank of Virginia being hopelessly insolvent did convey all of its assets, including the note sued on to George W. Camp in trust for the benefit of its creditors as authorized by the act of February 12th 1866. The plaintiffs in error after the assignment and notice of the same, purchased the bills of the Bank, at a depreciated price, and claimed the right to pay the trustee the amount of their note, in these Bankbills.

The only question before the Court below was, whether or not the assignee of the Bank was obliged to take the bills of the Bank purchased after the assignment, in payment of the note of the plaintiffs in error. The question was raised by the pleas, and was the only question decided.

It is submitted in support of the motion to dismiss for want of jurisdiction, that there is nothing in the record of this case that brings it within the operation of the 25th section of the Judiciary Act of 1789.

I need not refer the Court to the numerous and familiar authority which with singular unanimity decide that in order to give this Court jurisdiction of a case decided by a State Court of last resort, there are four indispensable requisites. 1st. That the validity of a State Statute must have been drawn in question. 2nd. that the decision must have been in favor of its validity. 3rd. That the Court below could not have reached the conclusion and judgment which it did reach without deciding the question of the validity of the State Statute, and 4th that all these indispensable facts must appear upon the record, either expressly or by clear and necessary intendment. Inglee vs. Coolage, 2 Wheaton, 363; Legrange vs. Choteau 4 Peters, 287; Crowell vs. Randall, 10 Peters, 368, 398, 399; 11 Peters, 167; 12 Peters, 66; 13 Peters,

153, 157; 14 Peters, 56, 540, 562, 580, 586; 16 Peters 525; 18 How. 515. Furman vs Nicol 8 Wall. 63. R.R. Co v Peck 4 Wallace 177

The facts necessary to give jurisdiction *must appear upon the record*—neither the statement nor the opinion of the Court that they were involved in the decision of the case will suffice. 2 Wheaton, 363; 13 Peters, 157; 15 Peters, 234. 4 Wallace 177

This Court will not infer that the Court below decided the case upon other points than those which appear upon the record to have been raised. 12 How. 98, 110.

These principles of law being established it only remains to consider whether or not the record of this case shows clearly

1st. That the validity of a State Statute was called in question.

2d. That the Court decided in favor of its validity.

3rd. That a decision upon the validity of the State Statute was indispensably necessary to the judgment rendered by the Court.

As before remarked, it is not quite clear upon the reading of the petition, upon what grounds, the jurisdiction of this Court is invoked. It is true that the plaintiffs in error, in one part of the petition, allege that the Act of Assembly of February 12th, 1866, violates and impairs the contract of guaranty, which sections 15 and 16, of the charter of the Bank impose, but farther on in the petition, they assert that the said Act does not abrogate sections 15 and 16, that the Legislature in passing said act only provided a more convenient and less expensive mode of winding up the affairs of the Bank—but that the Court of Appeals has placed a construction upon the act, which abrogates said sections, and impairs the obligation of the contract which said sections impose.

The defendant in error maintains that in the judgment of the Court of Appeals, there was not called in question the validity of a State Statute, and appeals to the record to sustain the correctness of the position. It does more, it shows affirmatively that no such question was raised or decided in the Court below.

Further the defendant in error maintains that the petition for the writ distinctly and unequivocally asserts, that the Act of February 12th, 1866, was valid and constitutional—Now the defend-

ants in error never raised any question as to its validity. The plaintiffs in error assert it to be a valid act. How then was it possible that the validity of an act which the plaintiffs and defendants agree was valid, could have been drawn in question? If neither plaintiff nor defendant raised the question, how could it have been decided by the Court?

Was the validity of any State Statute drawn in question upon the ground that it was violative of some constitutional provision? If so what statute?

Now the only two statutes referred to by the plaintiffs in error were the 15th and 16th sections of the Banking Law, and the Act of February 12th, 1866.

I need not say that the said sections are not obnoxious to such a criticism, because it is not alledged that they are, and upon their face it is apparent that they are not.

May I not go farther and say that the Act of February 12th is above such criticism, since I have the authority of the plaintiffs in error for such a conclusion?

It appears then that the record not only does not indicate that the validity of a State Statute was drawn in question, but actually shows that such was not the case; and it further appears from the petition of the plaintiffs in error that it was impossible that any such question could have been decided by the Court below.

But the real grievance of which the plaintiffs in error complain is apparent in the sentence of the petition, immediately preceeding the assignment of Errors, to wit:—"The Court of Appeals, however, has taken a different view of the subject and has treated the act as abrogating sections 15 and 16. If such is the effect, the obligation of the contract has been impaired and we are entitled to invoke this Court to protect us against the violation of the Constitution of the United States." The obligation of the contract, impaired by what? By the Act of February 12th, 1866? No, but by the construction which the Court of Appeals placed upon the act. 4 Wallace 177

Now concede that the Court of Appeals did construe the Act (which the record shows was not the case) and further that the

construction was erroneous, would that give jurisdiction to this Court? Certainly not. The decisions of this Court have invariably held that the decisions of State Courts construing State Statutes are not within the 25th Section of the Judiciary Act of 1789. McBride vs. Hoey, 11 Peters, 167; Strader vs. Graham, 10 How. 80; Commercial Bank of Cincinnati vs, Buckingham, 5 How. 317, 12 How. 165. But admit for the sake of the argument that sections 15 and 16 was a guaranty that the Bank should receive its notes in payment of debts due the Bank—there is nothing in the Act of February 12th, 1866, which repeals or modifies these sections—the Act does not declare that the Bank shall not receive its notes in payment of debts due the Bank. There is nothing in the act that impairs the obligation of the Bank to received its notes in payment of debts due to the Bank. The defendant in error never claimed that the Bank was not bound to receive its notes inpayment, or that the act of February 12th, 1866, relieved the Bank from that obligation. 19 Grattan 742

Without extended consideration of the decisions referred to, it is submitted that the case of Furman vs. Nichol 8 Wall. 44, is the latest and fullest authority upon the question of jurisdiction.—That case decides that in order to give the Court Jurisdiction *the record must show*, "either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the Court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand." "It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, *and that the Court was induced by it to make the judgment which it did.*"

Applying these tests to this case—the want of jurisdiction of this Court is strikingly apparent. The record shows that there was no question of constitutionality raised, and that the judgment of the Court below was entirely independent of any such consideration, and would have been the same if the act of February 12th, 1866, had never been passed.

For these reasons it is submitted that this Court has no juris-

diction of this case, and that it should be dismissed for want of jurisdiction.

H. O. CLAUGHTON.
Counsel for Defendant in error.

IN THE Supreme Court of the United States ~~Supreme Court~~.

JOHN S. KNOX, JR., and ROBERT F. KNOX, late copartners under the firm name of KNOX & BROTHER, and JOHN S. KNOX, Plaintiffs in Error.

vs.

THE EXCHANGE BANK OF VIRGINIA, use, &c., Defendant in Error.

Additional Brief of Counsel for Defendant in Error, on Motion to Dismiss for Want of Jurisdiction.

The brief of the Counsel for the plaintiffs in error, just submitted to me, goes beyond the legitimate argument upon the question of *jurisdiction*, and confusedly discusses the *merits* of the case. This it is submitted is not permissible.

The assertions that the State was a stockholder in the Bank, and that its notes were receivable in payment of dues to the State, have nothing to do with this case, and are not facts put in issue upon the record. They must have been introduced solely for the purpose of attempting to make the case, upon *its merits*, resemble the case of Woodruff vs. Trapnall—to which it has no analogy whatever.

The reference to the argument of the Counsel for the defendant in error, as contained in the petition for a supersedeas to the judgment of the Circuit Court for the City of Richmond, as if the same was a part of the record, shows that in order to give color of jurisdiction to this Court, it is necessary to go outside of the record of the case.

It has never been held that the argument of Counsel could give jurisdiction to the Court.

Mr. Justice Miller, in Railroad Company vs. Rock, 4 Wall. 177, says: "It is probable that Counsel in the argument of the case in the Supreme Court of Iowa insisted that these matters were involved, and that the Chief Justice felt bound to certify when requested, that they were drawn in question. But if the *record* does not show that they were *necessarily* drawn in question, this Court cannot take jurisdiction to reverse the decision of the highest Court in the State upon the ground that Counsel brought them in question in the argument."

The brief of the Counsel for the plaintiffs in error maintains that the grounds upon which the Court of Appeals rested its judgment, were either, that section 16 constituted no contract, and that the Act of February 12th, 1866, impaired the obligation of no contract, or that the General Assembly had the power to repeal, either expressly or by implication, the 16th section. This is only the speculation of Counsel; it is not even an inference, there is nothing in the record that justifies such an hypothesis.

Let us suppose that the Act of February 12th, 1866, had never been enacted, and that the bank had made the assignment to Camp. Concede that section 16 was a contract that the bank would receive its notes in payment of debts due to it, and that the Court so held, but at the same time decided that the assignee was not bound to receive the notes in payment, would such a judgment be reviewable here? This would be simply the construing of the State law, by a State Court. The question decided would be this, and this only: The debtor claims that the bank was under a contract to take the notes, and that therefore the assignee of the bank was bound to take them, and the Court decided that the claim of the debtor to pay the assignee in the notes of the bank was not sustained by the 16th section. In order to give the Court jurisdiction, something additional is necessary. The judgment must have been based upon some State law, which deprived the debtor of the right which section 16th gave him, the validity of which law was called in question, and the Court must have held the law to be valid, and that *it* deprived the debtor of the right to pay the assignee, in the notes of the

bank, although under section 16th he might have had that right. Or, to state the case more strongly for the plaintiffs in error, the Court must have decided that there was nothing in Section 16, which entitled the debtor to exemption from the claim of the assignee which *the Act of Febuary 12th*, 1866, *provided* for him.

The defendant in error must have claimed a right *under the Act of February 12th*, 1866, which the plaintiffs in error denied, *because of the provision of Section 16th*, and the Court must have decided the act to be valid, and based its judgment solely upon the validity of the act. Such was the case of Bridge Proprietors vs. Hoboken Company, 1 Wall1. 116, where one State Statute created a contract and another State Statute was alleged to impair it, and the Court construed the first Statute in such a manner as that the second Statute did not impair the first, whereby the second Statute remained valid under the Constitution of the United States. The only question before the Court was the validity of the Statutes. Such also was the case of Furman vs. Nichol.

But such is not this case. The defendant in error never claimed any right under the act of February 12th, 1866. The plaintiffs in error never called in question the validity of that act. The act repeals nothing —interferes with no one's rights—simply authorizes the Bank to do what the Bank could have done without the act—and distinctly provides that the rights of all parties should be preserved and protected.

What those rights were the act did not undertake to fix—that was left to the determination of the appropriate tribunals. So much for this case as shown by the record.

But the plaintiffs in error, having first relied upon the argument of counsel, have refered also to the reasons of the Court of Appeals of Virginia, to show that the validity of the act of February 12th was called in question, and that the judgment of the Court was based upon the validity of that statute. Give them the benefit of these unauthorized pretensions, and their last refuge fails them. Hear what the Court of Appeals says: "The sole question presented," is, "whether or not these depreciated bank notes, thus acquired, can be set off against the demands of the plaintiffs, suing for the use of the trustees of the creditors of the Bank. It is to this question that I shall confine my opinion." Was there another question, to wit, the validity of a State statute?

Again. "*But independently of the act of 12th February*, 1866, the obligations enforced and the rights established under it, according to the construction I have given it, it must be conceded, on *general principles*, that these notes of the Bank, acquired after notice of assignment, cannot be pleaded as set offs in actions brought by the assignees of the banks." * * * Is this not a declaration of the Court that its judgment was not based even upon the construction of the statute, but, on the contrary, was in-dependent of it?

It is respectfully submitted that the judgment of the Court of Appeals—if it is made the test—shows that this Court has no jurisdiction of this case.

H. O. CLAUGHTON,
Counsel for Defendants in error.

Adjourned December
Term 1870
No. 1.